

<b>TO:</b>  <b>Commissioner of Patents</b> <b>P.O. Box 1450</b> <b>Alexandria, VA 22313-1450</b> <b>or</b> <b>Commissioner of Trademarks</b> <b>P.O. Box 1451</b> <b>Alexandria, VA 22313-1451</b>	<b>REPORT ON THE</b> <b>FILING OR DETERMINATION OF AN</b> <b>ACTION REGARDING A PATENT OR</b> <b>TRADEMARK</b>
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In Compliance with 35 § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court Colorado on the following

DOCKET NO. <b>08-cv-01328-MSK-KMT</b>	DATE FILED <b>6/23/2008</b>	U.S. DISTRICT COURT <b>FOR THE DISTRICT OF COLORADO</b>
PLAINTIFF  ENCAPSULATION TECHNOLOGY, LLC		DEFENDANT  INSTACOTE, INC., ET AL
PATENT OR	DATE OF PATENT	HOLDER OF PATENT OR TRADEMARK
1 <b>5,878,355</b>		<b>Please see copy of Complaint attached hereto</b>
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4		
5		

In the above—entitled case, the following patent(s) have been included:

DATE INCLUDED	INCLUDED BY <input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading			
PATENT OR	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK		
1				
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In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT
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CLERK  <b>GREGORY C. LANGHAM</b>	(BY) DEPUTY CLERK	DATE
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aided, and abetted others to infringe the '355 Patent and has thereby induced infringement of the '355 Patent all to the damage of Plaintiff.

39. By virtue of its sale of and/or its recommended process for applying the CC Strip product, Defendant Instacote, with full knowledge of the '355 Patent, has induced, encouraged, aided, and abetted others to infringe the '355 Patent and has thereby induced infringement of the '355 Patent all to the damage of Plaintiff.

40. Defendant Nachtman has also, upon information and belief, and with full knowledge of the '355 patent induced, encouraged, aided and abetted others including Instacote to infringe the '355 patent and has thereby induced infringement of the '355 patent all to the damage of Plaintiff.

41. Defendants Smith, Hogue and Neveau as well as Defendants PMTech and Alpha Group by virtue of their respective employment of Hogue and Neveau, have also, upon information and belief, and with full knowledge of the '355 patent induced, encouraged, aided and abetted others, specifically the RFETS contractor(s), to infringe the '355 patent and have thereby induced infringement of the '355 patent all to the damage of Plaintiff.

42. Upon information and belief, Defendants have induced infringement willfully and wantonly and with full knowledge of the harm to Plaintiff and Plaintiff's rights; and therefore Plaintiff is entitled to increased damages under 35 U.S.C. §284. In addition, this is an exceptional case entitling Plaintiff to recover his attorneys' fees under 35 U.S.C. §285.

43. Plaintiff has been and will continue to be severely damaged by Defendants' unlawful infringement. Unless such infringement is abated and enjoined by this Court, Plaintiff will suffer irreparable damage.

**SECOND CLAIM FOR RELIEF**  
**Contributory Infringement**  
**35 U.S.C. § 271(c)**

44. Plaintiff incorporates the allegations of paragraphs 1 through 43 by reference, the same as if fully set forth herein.

45. 35 U.S.C. § 271(c) states that:

Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

46. Defendants have contributorily infringed the claims of the '355 Patent by their unauthorized sale of the CC Wet product knowing the same to be especially made for use in the infringement of the '355 Patent and not a staple article or commodity of commerce suitable for substantial noninfringing use.

47. Defendants have contributorily infringed the claims of the '355 Patent by their unauthorized sale of the CC Fix product knowing the same to be especially made for use in the infringement of the '355 Patent and not a staple article or commodity of commerce suitable for substantial noninfringing use.

48. Defendants have contributorily infringed the claims of the '355 Patent by their unauthorized sale of the CC Strip product knowing the same to be especially made for use in the infringement of the '355 Patent and not a staple article or commodity of commerce suitable for substantial noninfringing use.

49. Defendants had knowledge of the '355 Patent, and either knew or should have known that the sale of the CC Wet, CC Fix and CC Strip products contributorily infringed the '355 Patent, and induced others to infringe the '355 Patent. Defendants therefore acted willfully and wantonly in disregard of Plaintiff's rights. Such conduct constitutes willful and wanton infringement, and Plaintiff is thereby entitled to increased damages under 35 U.S.C. §284. Further, this is an exceptional case entitling Plaintiff to recover its reasonable attorneys' fees under 35 U.S.C. §285.

50. Plaintiff has been and will continue to be severely damaged by Defendants' unlawful infringement. Unless such infringement is abated and enjoined by this Court, Plaintiff will suffer irreparable damage.

**THIRD CLAIM FOR RELIEF**  
**Civil Conspiracy**

51. Plaintiff incorporates herein by reference Paragraphs 1-50 above and same shall apply as though fully set forth herein.

52. Defendants have combined one with the other to accomplish an unlawful purpose, i.e., to infringe Plaintiff's patent.

53. The combination of Defendants occurred after each had knowledge of the existence of Plaintiff's patent. Having such knowledge gives rise to a duty to investigate the patent and exercise caution before undertaking any activity that might infringe the patent. None of the Defendants exercised any caution in combining with one another to infringe Plaintiff's patent.

54. Defendants' overt acts have culminated in the infringement of Plaintiff's patent rights and Plaintiff has been injured as the proximate result thereof.

WHEREFORE, Plaintiff prays for judgment against Defendants and in favor of Plaintiff ordering, adjudging and declaring that:

1. Jurisdiction is present and venue is proper;
2. The '355 Patent is good and valid in law;
3. Defendants are liable, jointly and severally, for infringement of the '355 Patent;
4. An accounting be had to determine the damages adequate to compensate Plaintiff for the aforesaid infringement and that judgment in favor of Plaintiff be thereupon entered against Defendants, together with prejudgment interest;

5. The acts of infringement have been deliberate, willful, and wanton entitling Plaintiff pursuant to 35 U.S.C. § 284 to increased damages of three times the amount found or assessed;

6. A preliminary and permanent injunction be issued enjoining Defendants, their privies, and those in active consort therewith from further acts of infringement of the '355 Patent

and from aiding, abetting, or inducing or in any way contributing to the infringement of said Patent;

7. The instant case is an exceptional case and that Plaintiff be awarded its costs, expert witness fees, and reasonable attorneys' fees pursuant to 35 U.S.C. § 285 for which each defendant shall be jointly and severally liable;

8. Defendants are liable, jointly and severally, for civil conspiracy; and,

9. Plaintiff be granted such other and further relief as the Court may deem just and equitable.

**A JURY TRIAL IS REQUESTED**

DATED this 23<sup>rd</sup> day of June, 2008.

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**ATTORNEYS FOR ENCAPSULATION  
TECHNOLOGY, LLC**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. \_\_\_\_\_

ENCAPSULATION TECHNOLOGY, LLC, a California limited liability company,

Plaintiff,

v.

INSTACOTE, INC., an Ohio corporation;  
THOMAS NACHTMAN, an individual;  
CHARLES SMITH, an individual;  
PMTECH INC., a Colorado corporation;  
RICHARD S. HOGUE, an individual;  
ALPHA GROUP & ASSOCIATES, L.L.C., a Colorado limited liability company; and  
ROCK NEVEAU, an individual;

Defendants.

**COMPLAINT AND DEMAND FOR JURY TRIAL**

Plaintiff Encapsulation Technology, LLC. complains of Defendants and alleges as follows:

**SUBJECT MATTER JURISDICTION**

1. This is an action for patent infringement arising under the patent laws of the United States of America, Title 35, United States Code, and in particular, 35 U.S.C. § 271, et seq. Jurisdiction is based on 28 U.S.C. § 1338(a). The patent infringement as alleged has been and is now being carried out throughout the United States and within the District of Colorado.

2. This is also an action for civil conspiracy. This Court has jurisdiction of the conspiracy claim herein under the provisions of 28 U.S.C.S. § 1367 or under 28 U.S.C.S. §

1338(b) in that said claim is joined with a substantial and related claim under the patent laws of the United States.

### **THE PARTIES**

3. Plaintiff is a California limited liability company with its principal place of business in California.

4. Upon information and belief, Defendant Instacote, Inc. is a corporation organized under the laws of the State of Ohio with its principal place of business in Erie, Michigan.

5. Upon information and belief, Defendant Thomas Nachtman ("Nachtman") is a resident of the State of Michigan.

6. Upon information and belief, Defendant Nachtman is president of Defendant Instacote and, in that capacity, directs and controls Defendant Instacote.

7. Upon information and belief, Defendant Charles Smith ("Smith") is a resident of the State of Michigan and an employee of Defendant Instacote.

8. Plaintiff is informed and believes and thereon alleges that Defendant PMTech Inc. Inc. (PMTech) is a corporation organized under the laws of the State of Colorado with its principal place of business in Arvada, Colorado.

9. Upon information and belief, Defendant Richard Hogue ("Hogue") is a resident of the State of Colorado and either is or was an employee of PMTech.

10. Upon information and belief, Defendant Alpha Group & Associates, L.L.C. (Alpha Group) is a limited liability company organized under the laws of the State of Colorado with its principal place of business in Louisville, Colorado.



11. Upon information and belief, Defendant Rock Neveau ("Neveau") is a resident of the State of Colorado and either is or was an employee of Alpha Group.

#### **BACKGROUND**

12. The patent-in-suit is United States Patent No. 5,878,355 which is referred to herein as the "'355 Patent". The '355 Patent was duly and legally issued by the U.S. Patent and Trademark Office ("USPTO") on March 2, 1999 to Robert O. Berg, William F. Rigby and John P. Albers, all of whom assigned their entire right, title and interest in and to the '355 Patent to the Plaintiff. A true and accurate copy of the '355 Patent as issued by the USPTO on March 2, 1999 is attached hereto as Exhibit A.

13. By virtue of the aforementioned assignment to Plaintiff, Plaintiff has the right to sue for infringement of the '355 Patent.

14. The '355 Patent is entitled "Method and Apparatus for Encapsulating Particulates" and describes a method for collecting particulates such as hazardous plutonium particulates from a process area containing surfaces exposed to the particulates. The method includes the steps of generating a fog from a specially made liquid (referred to in the '355 Patent as an encapsulant or "capture liquid") and introducing the fog into the process area to coat the surfaces of the process area and encapsulate and adhere the particulates against the surfaces with the fog.

15. Plaintiff expended considerable money to fund the development of the invention disclosed in the '355 Patent. In addition, to protect its investment in the development of the invention, Plaintiff prepared and filed a patent application on the invention which was filed in

the USPTO and received an official filing date of August 30, 1996. The '355 Patent issued from this application on March 2, 1999.

16. From 1999 until 2002, Plaintiff enjoyed significant sales of a product sold under the mark "ETGS2 Invisible Green" (hereinafter "Invisible Green") to contractor(s) at the Rocky Flats Environmental Technology Site ("RFETS"). Plaintiff's Invisible Green product is an improved "capture liquid" as the term "capture liquid" is referred to in the '355 Patent and is specially made for use in carrying out Plaintiff's claimed methods of the '355 Patent. Plaintiff also sells other products which are specially made for use in carrying out Plaintiff's claimed methods of the '355 Patent. These other products are sold by Plaintiff under the marks, ETGS Invisible Green, ETGS Invisible Blue, ETGS2 Invisible Blue, ETGS, ETGS2, Soil Safe and Safe Peel. These products are referred to herein collectively as Plaintiff's "Covered Products". A photocopy of Plaintiff's Material Safety Data Sheet (MSDS) for its Invisible Green product is attached hereto as Exhibit B.

17. Since the RFETS contractor(s) purchased Plaintiff's Covered Products from Plaintiff, the RFETS's contractor(s) had what is referred to in the law as an "implied license" under the '355 Patent to use the Covered Products to practice Plaintiff's claimed methods of the '355 Patent. Accordingly, the RFETS contractor(s), on information and belief, lawfully practiced certain methods of the '355 Patent at RFETS from about 1999 until about 2002, as indicated above, to decontaminate and decommission certain buildings and other property at RFETS.

18. In addition, in January, 2001 and for a few months thereafter, Plaintiff worked

with Defendant Hogue, an employee of PMTech, for the purpose, among others, of promoting Plaintiff's Covered Products and the '355 Patent's method of applying the Covered Products to carry out the decontaminating and decommissioning work at RFETS. At this time and on information and belief until March, 2004, Hogue was an employee of PMTech which employed Hogue for the purpose of carrying out certain decontaminating and decommissioning work at RFETS.

19. On information and belief and unbeknownst to Plaintiff, shortly after Hogue began working with Plaintiff, Defendants Instacote, Nachtman and Smith conspired with Hogue to begin selling product similar to Plaintiff's Invisible Green to the RFETS contractor(s) for use in connection with the decontaminating and decommissioning work at RFETS.

20. On information and belief, Hogue disclosed the '355 Patent to Defendants Instacote, Nachtman and Smith as well as the formula for Plaintiff's Invisible Green product and other confidential information of Plaintiff's.

21. Defendants Instacote, Nachtman and Smith, armed with the '355 Patent, the Invisible Green formula and other confidential information provided by Hogue, formulated a version of Plaintiff's Invisible Green product which is sold by Defendant Instacote under the mark, "CC Wet", as identified in Defendant Instacote's brochure (attached hereto as Exhibit C).

22. In addition, Defendants Instacote, Nachtman and Smith, armed with the '355 Patent and other confidential information provided by Hogue including, on information and belief, the Plaintiff's formulas for its Soil Safe and Safe Peel products, formulated versions of Plaintiff's Soil Safe and Safe Peel products which are respectively sold by Defendant Instacote

under the marks, "CC Fix" and "CC Strip, as also identified in Defendant Instacote's brochure (Exhibit C).

23. Defendant Nachtman, as president of Defendant Instacote, was able to cause, and did cause, Defendant Instacote and Smith to formulate Instacote's CC Wet, CC Fix and CC Strip products.

24. Defendants Nachtman, Smith and Instacote have had full knowledge of the '355 Patent for some time now and Defendants Nachtman and Instacote in fact acknowledged in a letter dated August 27, 2002, that they could be infringing the '355 Patent. A copy of that letter is attached hereto as Exhibit D.

25. Defendant Hogue has also had full knowledge of the '355 Patent for some time now as also evidenced by the letter of Exhibit D.

26. Notwithstanding having full knowledge of the '355 Patent, Defendants Instacote, Nachtman, Smith and Hogue have sold or marketed and/or continue to sell or market Defendant Instacote's CC Wet, CC Fix and CC Strip products to the RFETS contractor(s) knowing the same to be especially made or especially adapted for use in the infringement of the '355 Patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use.

27. In addition, in 2002 Defendants Instacote, Nachtman, Smith and Hogue further conspired with Defendant Neveau to insure and guarantee that sales of Instacote's CC Wet, CC Fix and CC Strip products to the RFETS contractor(s) would continue. Defendant Neveau is an employee of Defendant Alpha Group and one of his duties as an employee of Alpha Group is to

recommend and oversee the use of products at RFETS for carrying out the decontaminating and decommissioning work at RFETS.

28. Defendant Neveau also had knowledge of the '355 Patent and has admitted reading the '355 Patent or its later companion patent, U.S. Patent No 6,102,992 (the '992 Patent) and discussing the patent(s) with Defendant Hogue. Even if Neveau only read the '992 Patent he was legally on notice of the '355 Patent and had a duty to review the '355 Patent since the '992 Patent references the earlier '355 Patent.

29. Accordingly, notwithstanding having full knowledge of the '355 Patent, Defendant Neveau also sold or marketed and/or continues to sell or participate in the sale of Defendant Instacote's CC Wet, CC Fix and CC Strip products to the RFETS contractor(s) knowing the same to be especially made or especially adapted for use in the infringement of the '355 Patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use.

30. In addition and with full knowledge of the '355 Patent, Defendants Instacote, Nachtman, Smith, Hogue and Neveau have recommended and continue to recommend to RFETS contractor(s) that Defendant Instacote's CC Wet, CC Fix and CC Strip products be applied or used in a manner that infringes certain method claims of the '355 Patent.

31. Defendant PMTech is liable for the actions of Hogue by virtue of Hogue's apparent authority, position with, or nexus to, his employment with PMTech, which enabled Hogue to commit wrongful acts and other torts.

32. Defendant Alpha Group is liable for the actions of Neveau by virtue of Noveau's

apparent authority, position with, or nexus to, his employment with Alpha Group, which enabled Noveau to commit wrongful acts and other torts.

33. On information and belief, the RFETS contractor(s) has used, and continues to use, Instacote's CC Wet, CC Fix and CC Strip products in a manner that infringes certain method claims of the '355 Patent for purposes of decontaminating and decommissioning certain buildings and other property at RFETS.

34. All conditions precedent to the bringing of this action have been performed or have occurred.

**FIRST CLAIM FOR RELIEF**  
**Inducing Infringement**  
**35 U.S.C. § 271(b)**

35. Plaintiff incorporates the allegations of paragraphs 1 through 34 by reference, the same as if fully set forth herein.

36. 35 U.S.C. § 271(b) states that:

Whoever actively induces infringement of a patent shall be liable as an infringer.

37. By virtue of its sale of and/or its recommended process for applying the CC Wet product, Defendant Instacote, with full knowledge of the '355 Patent, has induced, encouraged, aided, and abetted others to infringe the '355 Patent and has thereby induced infringement of the '355 Patent all to the damage of Plaintiff.

38. By virtue of its sale of and/or its recommended process for applying the CC Fix product, Defendant Instacote, with full knowledge of the '355 Patent, has induced, encouraged,